Ahmad Fuad bin Abd Rahman v Shell Malaysia Trading Sdn Bhd

HIGH COURT (ALOR SETAR) — CIVIL APPEAL NO 12(B) NCVC-18–04 OF 2015
CHOO KAH SING JC
4 SEPTEMBER 2016

Civil Procedure — Appeal — Appeal to High Court — Breach of term of agreement — Whether termination of agreements was lawful

Contract — Termination — Wrongful termination — Appellant and respondent entered into two agreements relating to Shell petrol station — Agreements terminated by respondent — Whether appellant breached law — Whether breached agreements — Whether respondent discharged its burden to prove that termination of agreements lawful

The appellant and the respondent had entered into two agreements, namely the Shell retailer licence agreement ('RELA') whereby the appellant was granted the right and licence to enter upon and operate the station and Shell ONFR licence agreement ('SOLA') which granted the appellant the licence to carry out non-fuel retailing business at the station. The respondent averred that the appellant had breached the Control of Supplies Regulations 1974 by selling petrol to vehicles that exceeded the maximum limit on several occasions at the station. Thus, the respondent terminated the agreements on the basis that the appellant had breached a serious term in the RELA. In both agreements, it was stated that when one of the agreements was terminated, the other one would be automatically terminated as well. Following the termination of both contracts, the appellant brought an action alleging the respondent had wrongfully terminated the two agreements. The learned sessions court judge dismissed the claim, hence, the present appeal.

Held, dismissing the appeal with costs of RM5,000:

(1) The oral evidence and documentary evidence have supported the fact, on a balance of probabilities, that the appellant had been selling petrol that exceeded the permitted maximum limit to his 'customers' per visit. Hence, the court was satisfied that the appellant had indeed breached the law that would in turn lead to the fact that the appellant had breached cl 39.1 of the RELA (see paras 29–30).

(2) As the respondent had lawfully invoked the termination clause, pursuant to cl 21 of the RELA, the SOLA shall be automatically terminated as well. Thus, the termination of the RELA and SOLA was lawful (see para 32).

(3) The court could not agree with the appellant's submission that the termination of the agreements based on the alleged fact that the appellant violated s 14 of the Control of Supplies Act 1961 (Revised 1973) was premature and unlawful as the respondent's case was that the appellant had violated a law which was sufficient to justify a breach of terms of agreement of the RELA (see paras 36–37).

(4) There was no necessity for the appellant to have been prosecuted and convicted of a criminal offence for contravention of law. Based on the evidence adduced in the respondent's case, there was ample evidence to suggest that the appellant had violated the law. Thus, the respondent had discharged its burden to prove the termination of the agreements was lawful (see para 38).

[Bahasa Malaysia summary

Perayu dan responden telah memasuki dua perjanjian, iaitu perjanjian lesen peruncit Shell ('RELA') di mana perayu diberikan hak dan lesen untuk memasuki dan mengendalikan stesyen dan perjanjian lesen ONFR Shell ('SOLA') yang mana memberikan perayu lesen untuk menjalankan perniagaan runcit bukan bahan bakar di stesyen tersebut. Responden berhujah bahawa perayu telah melanggar Peraturan-Peraturan Kawalan Bekalan 1974 dengan menjual minyak kepada kenderaan-kenderaan yang telah melebihi had maksimum beberapa kali di stesyen tersebut. Oleh itu, responden menamatkan perjanjian atas dasar bahawa perayu telah melanggar terma serius di dalam RELA tersebut. Di dalam kedua-dua perjanjian, ia dinyatakan bahawa apabila salah satu perjanjian ditamatkan, yang lagi satu akan secara automatik ditamatkan juga. Berikutan penamatan kedua-dua kontrak, perayu mengambil tindakan dengan mendakwa responden telah secara salah menamatkan kedua-dua perjanjian tersebut. Hakim mahkamah sesyen yang bijaksana menolak tuntutan tersebut, maka rayuan ini.

Diputuskan, menolak rayuan dengan kos sebanyak RM5,000:

(1) Keterangan lisan dan keterangan dokumentar telah menyokong fakta, atas imbangan kebarangkalian, bahawa perayu telah menjual minyak yang melebihi had maksimum yang dibenarkan kepada 'customers' nya setiap pembelian. Maka, mahkamah berpuas hati bahawa perayu telah sememangnya melanggar undang-undang yang akan sebaliknya membawa kepada fakta bahawa perayu telah melanggar klausa 39.1 RELA (lihat perenggan 29–30).

(2) Memandangkan responden telah secara sah membangkitkan klausa penamatan, berikutan klausa 21 RELA, SOLA akan ditamatkan secara

automatik juga. Oleh itu, penamatan RELA dan SOLA adalah sah (lihat perenggan 32).

(3) Mahkamah tidak dapat bersetuju dengan hujahan perayu bahawa penamatan perjanjian berdasarkan fakta yang didakwa bahawa perayu mencabuli s 14 Akta Kawalan Bekalan 1961 (Disemak 1973) adalah pramatang dan tak sah kerana kes responden adalah bahawa perayu telah mencabuli undang-undang yang mana adalah mencukupi untuk menjustifikasikan pelanggaran terma-terma perjanjian RELA (lihat perenggan 36–37).

(4) Tidak perlu bagi perayu didakwa dan disabitkan terhadap kesalahan jenayah kerana melanggar undang-undang. Berdasarkan keterangan yang dikemukakan di dalam kes responden, terdapat keterangan yang kukuh untuk mencadangkan bahawa perayu telah mencabuli undang-undang. Oleh itu, responden telah melepaskan bebannya untuk membuktikan penamatan perjanjian-perjanjian tersebut adalah sah (lihat perenggan 38).]

Notes

For cases on appeal to high court, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1035–1052.
For cases on wrongful termination, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 7110–7115.

Legislation referred to

Control of Supplies Act 1961 (Revised 1973) s 14
Control of Supplies Regulations 1974
Petroleum Development Act 1974 s 6(3)

Muhamad Samsul Nizam (Burhan & Co) for the appellant.
Koh Pei Siah (Azim, Tunku Farik & Wong) for the respondent.

Choo Kah Sing JC:

INTRODUCTION

[1] This case concerns a termination of two agreements between the respondent and the appellant relating to a Shell petrol station.

[2] The respondent company had terminated the two agreements, and the appellant was not satisfied with the termination. The appellant had brought an action alleging the respondent had wrongfully terminated the two agreements.

[3] The parties had gone through a full trial at the sessions court, Alor Setar. The learned sessions court judge ('the SCJ') dismissed the plaintiff's claim.

However, before the SCJ could deliver her grounds of judgment, she had retired. As such, there were no grounds of judgment of the lower court. The appellant was not satisfied with the SCJ's decision and appealed to the High Court.

[4] On 24 July 2016, this court dismissed the appellant's appeal and affirmed the SCJ's decision. The appellant was not satisfied with the ruling and has filed an appeal to the Court of Appeal. This judgment serves as the reasons for this court's decision. The reasons are set down as below.

BACKGROUND FACTS

[5] The respondent company is the owner of a petrol filing station located at Batu 12 1/2, Jalan Masjid, 06000 Jitra, Kedah ('the station').

[6] On 9 November 2011, the appellant and respondent had entered into a Shell retailer licence agreement ('the RELA').

[7] In the RELA, the respondent agreed to grant a right and licence to the appellant to enter upon and operate the station, which including the running of the business of sale of motor fuels under the grades and brands of Shell petrol, automotive diesel, LPG and any other fuels that may be nominated from time to time by Shell. The commencement date of the RELA was on 1 January 2012 and it expires on 31 November 2016, viz a duration of five years.

[8] The parties had also entered into a Shell ONFR licence agreement ('the SOLA'). 'ONFR' stands for other non-fuel retailing business carried out at the station. The appellant was granted a licence to carry out basic vehicle servicing and maintenance (oil change, replacement of small parts, minor repairs), selling of Shell branded lubricants, battery water and other car care products and et cetera at the station. The duration of the SOLA was also five years.

[9] The RELA and SOLA shall collectively hereinafter referred to as 'the agreements'.

[10] It is to be noted that cl 21.1 of the SOLA stated as follows:

> Where the Licensee is also the licensee under the RELA, this Agreement shall automatically be terminated in the event that the RELA is terminated.

[11] The corresponding clause in the RELA in reference to the SOLA is cl 21.1 which states as follows:

Where the Licensee is also the licensee under the SOLA, the SOLA shall automatically be terminated simultaneously in the event of this Agreement being terminated.

[12] The respondent contended that the termination of the agreements was lawful because the appellant had breached a serious term in the RELA, particularly cl 39.1 which states as follows:

The *Licensee will comply with*, and ensure its staff comply with, *all applicable laws in Malaysia* and such other relevant jurisdiction. The Licensee will, to the maximum extent permitted by law, indemnify and defend Shell from and against any loss, cost (including legal fees), liability, claim or damage incurred or suffered as a result of the Licensee's non-compliance with the applicable laws or failure to obtain necessary permits and/or approvals.

[13] The applicable law relevant to the present facts is the Control of Supplies Act 1961 (Revised 1973) ('Act 122'), s 14 which states as follows:

Any person who sells any *controlled article* to any other person *in excess of the quantity* which may be lawfully acquired by such other person in accordance with any regulations made under section 6 shall be guilty of an offence against this Act.

[14] The respondent stated that the limit set by the authority under the Control of Supplies Regulations 1974 for any road transport vehicle to fill its tank is a maximum of only 250 litres petrol/diesel per visit.

[15] Any person who sells to a vehicle that filled more than 250 litres of petrol/diesel in its tank per visit would be in contravention of the Regulations which in turn amounts to violation of s 14 of Act 122.

[16] The respondent averred that the appellant had breached the above regulation by selling petrol to vehicles that exceeded the maximum limit on several occasions at the station.

[17] The appellant denied any such wrong doing and contended that the respondent had wrongfully terminated the agreements, and as a result of the wrongful termination, the appellant had suffered losses. The appellant prayed for the agreements to be reinstated and also claimed for damages for the loss suffered.

THE FINDING OF THIS COURT

[18] In support of the respondent's allegation that the appellant had breached cl 39.1 of the RELA, the respondent had adduced the evidence as below.

[19] Firstly, the evidence of SD2 and SD6. SD2 is the Deputy Director of the Ministry of Domestic Trade and Consumer Affairs, Sarawak Branch (Kementerian Perdagangan Dalam Negeri, Koperasi dan Kepenggunaan — KPDNKK); and SD6 is the Head of Finance from the same ministry department, but from Kubang Pasu, Kedah Branch.

[20] They both testified at the lower court. They stated that on 12 September 2012, they went to the station for a routine inspection and observation of any illegal activities, particularly selling of petrol/diesel to 'projects' vehicle. 'Project' vehicle is a vehicle which petrol/diesel tank has been modified to store more capacity than it normally can. These are syndicated vehicles involved in smuggling petrol/diesel across the border to the neighbouring country.

[21] SD2 and SD6 saw a vehicle (type Proton Saga) filling petrol at the station for approximately 10–15 minutes which was unusually long for such type of vehicle. This raised their suspicion that the petrol tank could have been modified. They attempted to approach the vehicle, but the driver swiftly sped off from the station.

[22] SD2 and SD6 then approached the person in charge of the station who was the appellant. They testified that during their encounter with the appellant, the appellant knew such incidents, ie project vehicles filling petrol, were taking place in the station. The appellant confessed to SD2 and SD6 and gave them his assurance that it would not happen again. He said he would inform his staff to prevent such incidents from happening again, said SD2 and SD6.

[23] SD2 and SD6 then left the appellant, but they were still within the vicinity of the station. SD2 and SD6 observed a similar incident happened for the second time. The suspected vehicle managed to escape when SD2 and SD6 attempted to approach the vehicle. SD2 and SD6 went to confront the appellant for the second time. This time, the appellant kept mum and did not say anything.

[24] The appellant denied the above alleged facts during the trial.

[25] Secondly, the evidence of SD9. SD9 was one of those persons who had carried out the illegal activities of 'project' vehicle. He admitted that he had been frequently visiting the station to fill petrol in his 'project' vehicle. On each occasion, he filled approximately 600 litres of petrol into his vehicle. Each day he visited the station twice, and had been doing it for the past four months.

[26] Thirdly, the evidence of SD7. SD7 is an assistant enforcement officer

from the Ministry of Domestic Trade and Consumer Affairs. She narrated that on 6 February 2012, she was at the station. She found a Malay man was filling petrol in his vehicle, and the Malay man admitted to her that he was filling petrol into his extra tank in the vehicle.

[27] Lastly, in P12, a letter from to appellant to the respondent, the appellant stated, inter alia, that the appellant undertakes no such incident will happen again under his close supervision. Clearly, the statement implicitly admitted that the appellant knew what was happening at the station.

[28] P12 was the appellant's response to a show cause letter dated 17 October 2012 ('P11') issued by the respondent to the appellant. The appellant did not answer the show cause letter properly, instead, the appellant gave an undertaking such incident would not happen again.

[29] The above oral evidence and documentary evidence have supported the fact, on a balance of probabilities, that the appellant had been selling petrol that exceeded the permitted maximum limit, ie 250 litres, to his 'customers' per visit.

[30] Based on the above finding of fact which was supported by oral and documentary evidence, this court was satisfied that the appellant had indeed breached the law, ie Act 122 and its Regulations. This would in turn lead to the fact that the appellant had breached cl 39.1 of the RELA.

[31] Clause 20.3 of the RELA states:

> Without prejudice to any other remedies Shell may have against the Licensee, Shell shall have the right at any time by giving notice in writing to the Licensee to terminate this Agreement forthwith in any of the following events:
>
> (a) The Licensee commit/s a breach of any of the terms and conditions of this Agreement or engages in any fraudulent activity;

[32] The respondent had lawfully invoked the above termination clause against the appellant. Pursuant to cl 21 of the RELA (see above), the SOLA shall automatically be terminated as well. Hence, the termination of the RELA and SOLA was lawful.

[33] The respondent also contended that the appellant failed to obtain a renewal of his licence Siri A 004520 dated 26 April 2010 issued by the relevant authority under s 6(3) of the Petroleum Development Act 1974.

[34] Section 6 of the Act states as follows:

(1) Notwithstanding the provisions of any other written law, no business of processing or refining of petroleum or manufacturing of petro-chemical products from petroleum, may be carried out by any person other than PETRONAS unless there is in respect of any such business a permission given by the Prime Minister.

(2) Any person who on the commencement of this Act is carrying on any business referred to in subsection (1) may continue to do so but shall, not later than six months from the date of the commencement of this Act, apply in writing to the Prime Minister for his permission referred to in subsection (1).

(3) *Subsection (1) shall apply to any business of marketing or distributing of petroleum or petro-chemical products*; and any person who on the commencement of this subsection is carrying on any such business may continue to do so but shall, not later than six months from the date of commencement of this subsection, apply in writing to the Prime Minister for his permission referred to in subsection (1).

(4) ...

[35] The respondent contended that the appellant could no longer carry out the licence under the RELA and/or SOLA even if the termination was unlawful because the appellant's licence under the Petroleum Development Act 1974 has been cancelled by the relevant authority.

[36] The appellant's counsel contended that the respondent did not prove that the appellant had actually violated s 14 of the Act 122 because the appellant has not been convicted under the said Act 122. Hence, the termination of the agreements based on the alleged fact that the appellant violated s 14 of the Act 122 was premature and unlawful.

[37] This court could not agree with the appellant's counsel's submission. The respondent's case was that the appellant had violated a law which was in turn sufficient to justify a breach of the terms of agreement of the RELA.

[38] The burden of proof in the respondent's case is to prove the termination was lawful based on a standard of balance of probabilities in that the appellant had violated a law. There is no necessity for the appellant to have been prosecuted and convicted of a criminal offence for contravention of a law. Based on the evidence adduced in the respondent's case, there was ample evidence to suggest that the appellant had violated the law, ie he was selling petrol to customers that exceeded the limit permitted in law. The respondent had discharged its burden to prove the termination of the agreements was lawful.

CONCLUSION

[39] Based on the above finding, the court was satisfied that the termination of the agreements was lawful. Hence, this court dismissed the appellant's appeal and awarded costs of RM5,000 to be paid to the respondent by the appellant.

Appeal dismissed with costs of RM5,000.

Reported by Jacqueleen Kho